EDMUND MING KWAN A

v.

EXTRA EXCEL (MALAYSIA) SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
HISHAMUDIN MOHD YUNUS J
[PETITION NO: D1-26-56-2004]
23 JANUARY 2013

COMPANY LAW: *Directors - Action against - Petition by minority shareholder - Whether directors accountable for alleged losses to company - Whether petitioner entitled to relief sought - Whether complaints bona fide - Whether petitioner came to court with clean hands - Whether majority shareholders could rely on s. 181 Companies Act 1965 to cross-petition for relief against minority shareholder - Whether allegation of fraud established beyond reasonable doubt* C D

COMPANY LAW: *Members' rights - Petition under Companies Act 1965, s. 181 - Action against directors - Whether directors accountable for alleged losses to company - Whether petitioner entitled to relief sought - Whether petition under s. 181 can be brought against minority shareholder* E

The petitioner together with the fourth and fifth respondents had established the first respondent company ('the company'), known then as E. Excel (Malaysia) Sdn Bhd, with the petitioner and the fourth respondent each holding 48% of the issued capital and the fifth respondent ('R5'), 4%. It was agreed amongst them that in return for the petitioner not paying for his shares, he would work for the company and develop its business. He was appointed as the company's general manager and director. The company performed poorly and a decision was taken a year later to wind it up. The petitioner had at that time offered to sell his shares but there were no takers. The company was not wound up. Instead, the other directors discovered that the petitioner had been secretly embezzling the company's funds. He was removed as director and the second respondent ('R2') was appointed as acting general manager with a salary and commission on sales. Under R2, the company prospered. Ever since the petitioner was removed as director, nothing was heard of him for the next seven years. He did not notify the company of his new address nor did he contact the company's directors or enquire about its affairs. During those F G H I

seven years, major changes took place in the company's shareholding making the petitioner a minority shareholder. Seven years after he had stayed away, the petitioner contacted the company and asked for, and was furnished with its accounts since the time he ceased to be a director. He notified the company of his new address and, although it thereafter sent to him the audited accounts and notices of shareholders' meetings, the petitioner again failed to make any contact with the company for another five years. He suddenly re-emerged to attend the company's 12th annual general meeting, shortly after which he wrote to the company seeking clarifications on various matters such as (i) the reason why dividends had not been declared; (ii) why certain payments were made to a Taiwanese company; why there was an increase in the paid-up capital; (iv) why the directors were paid excessive remunerations; and (v) why excessive sums were paid for the company's computer system and for professional and legal charges. The petitioner then filed the instant petition under s. 181 of the Companies Act 1965 ('CA'), alleging that the company had suffered losses from alleged fraudulent payments or transactions made and seeking, *inter alia*, to hold R2 and R5 accountable for, and to make good, such losses. He also wanted the court to cancel the changes to the shareholding that had taken place over the previous ten years. The respondents, in turn, cross-petitioned, also based on s. 181 of the CA, for an order that the respondent's shareholding in the company be sold to them at a price determined by the court after a proper and independent valuation of the shares. The respondents contended that it was the petitioner's actions, rather than their own, which were prejudicial to the company and oppressive to them as shareholders.

Held (dismissing both the petition and the cross-petition):

(1) The petitioner did not come to court with clean hands. Unbeknownst to the other directors, he had since October 1992 been withdrawing money from the company's accounts without authorisation from the Board of Directors. In a petition under s. 181, the petitioner's conduct was relevant in deciding whether there had been unfairness and whether such conduct affected or denied the relief that was being sought. (paras 43 & 44)

(2) The petitioner chose not to protest or complain about what the directors or the majority shareholders of the company had been doing until after a very long delay of ten years during which time he had shown complete disinterestedness in the affairs of the company. By his conduct, he had disentitled himself from the relief by acquiescing to a state of affairs of which he later complained thereby rendering the complaint not *bona fide*. The petitioner also failed to establish his allegations of fraud beyond reasonable doubt. (paras 46, 50 & 51)

(3) The cross-petition which was also based on s. 181 of the CA had to be dismissed as a petition under s. 181 CA could only be brought against a controlling shareholder of a company. The petitioner was only a minority shareholder and was not in a position to conduct the affairs of the company let alone in a manner oppressive to the respondents. (paras 56 & 57).

Case(s) referred to:

Ang Hiok Seng v. Yim Yut Kiu [1997] 1 CLJ 497 FC ***(foll)***
Grace v. Bagioli and Others [2006] 2 BCLC 70 ***(refd)***
Howard Smith Ltd and Ampol Petroleum Ltd And Others [1974] AC 821 ***(refd)***
In re A Company [1986] BCLC 362 ***(refd)***
In re Jermyn Street Turkish Baths Ltd [1971] 1 WLR 1042 ***(refd)***
In re London School of Electronics Ltd [1986] Ch 211 ***(foll)***
Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & 5 Ors And Another Application [1994] 1 LNS 73 HC ***(refd)***
Pan Pacific Construction Holdings Sdn Bhd v. Ngiu-Kee Corporation (M) Sdn Bhd & Anor [2010] 6 CLJ 721 FC ***(refd)***
Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung [1978] 1 LNS 170 PC ***(foll)***
Re Saul D Harrison & Sons plc [1995] 1 BCLC 14 ***(refd)***
Re Senson Auto Supplies Sdn Bhd [1987] 1 LNS 110 HC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 181(1)(a)

For the petitioner - Logan Sabapathy (LH Wong & PY Liew with him); M/s Logan Sabapathy & Co
For the respondents - K Mohan (Raymond Mah, Chrysh Niles & Selena Kong with him); M/s Mah Weng Kwai & Assocs

Reported by Ashok Kumar

JUDGMENT

Hishamudin Mohd Yunus J:

[1] This is a petition under s. 181 of the Companies Act 1965 ('the Companies Act'). By this petition, the petitioner, Mr. Edmund Kwan, seeks relief in respect of various payments or transactions by the first respondent company, Extra Excel (Malaysia) Sdn Bhd ('the respondent company'), that are alleged to be excessive, fraudulent or fictitious.

[2] The principal relief sought is for the second and fifth respondents (Mr. Hendrik Tjandra and Mr. Lau Pak Heng) to be accountable for the alleged losses resulting from such alleged fraudulent payments or expenses; or, in the alternative, for the second and fifth respondents to account and pay to the respondent company such sums received from these transactions.

[3] The petitioner also challenges the current shareholding structure of the respondent company, urging the court to cancel the shareholding changes that have taken place in the company over a period of ten years.

[4] There is also a cross-petition by the respondents.

The Statutory Provisions

[5] The relevant provisions of s. 181 of the Companies Act read as follows;

> **181. Remedy in cases of an oppression.**
>
> (1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground:
>
> (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
>
> (b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

The Respondents' Position

[6] In opposing the petition, the respondents submit:

(a) that the petitioner is disentitled to relief under s. 181 by reason of delay, acquiescence, abandonment or estoppel;

(b) that the petitioner has failed to show that he has by reason of unfairness suffered harm or prejudice; and

(c) that each of the allegations, when analysed, does not amount to oppressive or unfair conduct.

The Legal Principles

[7] It is a well recognised principle that those who invest in companies must accept the majority rule; and that in order to establish oppression within the meaning of s. 181, a petitioner must show that there has been a visible departure from the standards of fair dealing that a shareholder is entitled to expect. In *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung* [1978] 1 LNS 170; [1978] 2 MLJ 227 Lord Wilberforce, in delivering the judgment of the Board, said (at p. 229 (MLJ)):

> Secondly, for the case to be brought within section 181(1)(a) at all, the complaint must identify and prove "oppression" or "disregard". The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked. As we said in a decision upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made (*Elder v. Elder & Watson Ltd*): their Lordships would place the emphasis on "visible". And similarly "disregard" involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure (per Lord Clyde in *Thompson v. Drysdale*). Neither "oppression" nor "disregard" need be shown by a use of the majority's voting power to vote

down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point in time, can be held to have crossed the line.

[8] A breach of fiduciary duty does not by itself amount to oppression or unfairness. In *Pan Pacific Construction Holdings Sdn Bhd v. Ngiu-Kee Corporation (M) Sdn Bhd & Anor* [2010] 6 CLJ 721 the Federal Court held (at p. 738, paras. 41 and 42):

> It has also been held that merely establishing that a respondent has, in breach of its fiduciary duty brought about a transaction involving the assets of the company which had benefited the majority shareholder would not suffice to enable a petitioner to obtain an order under s. 459 of the English Companies Act 1985 unless the petitioner could show that it had suffered loss by reason of the transaction. (See: *Rock Nominees Ltd v. RCO (Holdings) Plc* [2004] 1 BCLC 439).
>
> Premised therefore on the foregoing discourse there is merit in the submission of learned counsel for the respondent when he submitted:
>
> (i) that in order for the petitioner to succeed it is not enough to merely 'raise or establish that there was any breach of any fiduciary duty or duties but must also establish that any such breach (if any) constitutes oppressive conduct, conduct in disregard of interest, unfairly discriminatory conduct or prejudicial conduct' within the scope of s. 181(1)(a) or (b) of the Act; and
>
> (ii) that in the final analysis the question whether there is oppression, disregard, unfair discrimination or whether the act complained of is prejudicial is one that must be determined according to the facts of each particular case.

[9] When hearing a s. 181 petition, it is not the function of the court to sit in review over management decisions or to substitute its own decision for that of the management. The Privy Council in *Howard Smith Ltd and Ampol Petroleum Ltd And Others* [1974] AC 821, (*via* the judgment of Lord Wilberforce) held (at p. 832):

> Their Lordships accept that such a matter as the raising of finance is one of management, within the responsibility of the directors: they accept that it would be wrong for the court to substitute its opinion for that of the management, or indeed to question the correctness of the management's decision, on such a question, if *bona fide* arrived at. There is no appeal on merits from

> management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.

[10] In determining whether there has been unfair dealing, one must begin by looking at the agreement between the parties, particularly, as embodied in the Memorandum and Articles of Association of the company concerned ('the M & A'). In this regard, I refer to the Federal Court's decision in *Pan Pacific Construction* (at p. 735, paras. 27 and 28):

> It may also be noted that from the wordings of s. 181 its basic theme is 'unfairness'. However, 'unfairness' does not mean that the Court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. "The court … has a very wide discretion, but it does not sit under a palm tree". (See: *O'Neil v. Philips* [1999] 2 All ER 961.)
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> In *Re Saul D Harrison & Sons Plc* [1995] 1 BCLC 14 it was explained (Hoffmann LJ (as he then was)) that in 'deciding what is fair or unfair for the purposes of s. 459, it is important to have in mind that fairness is being used in the context of a commercial relationship. The articles of association are just what their name implies: the contractual terms which govern the relationships of the shareholders with the company and each other. They determine the powers of the board and the company in general meeting and everyone who becomes a member of a company is taken to have agreed to them. Since keeping promises and honouring agreements is probably the most important element of commercial fairness, the starting point in any case under s. 459 will be to ask whether the conduct of which the shareholder complains was in accordance with the articles of association … The answer to this question often turns on the fact that the powers which the shareholders have entrusted to the board are fiduciary powers, which must be exercised for the benefit of the company as a whole … But the fact that the board are protected by the principle of majority rule does not necessarily prevent their conduct from being unfair within the meaning of s. 459.

[11] Neither a breach of the M & A nor a technical infringement of the law would necessarily amount to oppression or unfairness. In *Re Saul D Harrison & Sons Plc* [1995] 1 BCLC 14 the United Kingdom Court of Appeal held (at p. 18):

> Although one begins with the articles and the powers of the board, a finding that conduct was not in accordance with the articles does not necessarily mean that it was unfair, still less that the court will exercise its discretion to grant relief. There is often sound sense in the rule in *Foss v. Harbottle* (1843) 2 Hare 461. In choosing the term 'unfairly prejudicial', the Jenkins Committee (para 204) equated it with Lord Cooper's understanding of 'oppression' in *Elder v. Elder and Watson* 1952 SC 49:
>
> > a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely.
>
> So trivial or technical infringements of the articles were not intended to give rise to petitions under s. 459.
>
> Not only may conduct be technically unlawful without being unfair: it can also be unfair without being unlawful.

[12] A petitioner under a s. 181 petition must show that his interests as a 'member' and not in some other capacity have been affected (see *In Re A Company* [1986] BCLC 362).

[13] Finally, a party alleging fraud in civil cases must satisfy a high standard of proof: that of beyond reasonable doubt (see *Ang Hiok Seng v. Yim Yut Kiu* [1997] 1 CLJ 497; [1997] 2 MLJ 45).

The Finding Of Facts

[14] Having set out some of the important basic principles pertaining to a s. 181 petition, I shall now turn to the facts of the case as I find them based on the evidence.

[15] The respondent company was established on 20 August 1991. It is involved in the business of multi level marketing of health and nutritional products. The company does not own the products, but markets and distributes them pursuant to its distributorship agreements with a company incorporated in the United States (based in the State of Utah) called 'E. Excel Inc.' ('EE(USA)').

[16] The present directors and shareholders of the company are as shown in the table below:

Directors
Hendrik Tjandra
Barry Le Huan-Hsin
Andrew Lee

Shareholder	Percentage of Shareholdings (%)
Hendrik Tjandra	5.34
Dr. Chen Jau Fei	79.76
Barry Le Huan-Hsin	9.25
Lau Pak Heng	0.59
Petitioner	4.97
TOTAL	**100**

[17] The shareholders are not just investors: they contribute in various ways to the business of the company.

[18] An important personality behind EE (USA) is the third respondent, Dr. Chen Jau Fei, a nutritional immunologist. She plays an active role in developing and marketing the products. She frequently appears in seminars and at promotional events all over the world.

[19] The petitioner had no involvement in the development of the products. The petitioner also had no previous experience in multi level marketing before joining the respondent company.

[20] The fourth respondent, Barry Le, is a Taiwanese national. He has known Dr. Chen for some years through his involvement in a Taiwanese company called 'Extra Excel International (Taiwan) Inc' (EET) – the distributor for the products in Taiwan.

[21] The petitioner had been acquainted with Barry Le since the late 1980s.

[22] In 1991, Barry Le obtained Dr. Chen's consent to distribute the products in Malaysia.

[23] Around this time, the petitioner's business in Taiwan was not doing well. Barry Le took the petitioner in and gave him the opportunity to set up business in Malaysia. Hence, the petitioner came to Malaysia and began working distributing the products. The petitioner together with Barry Le and the fifth respondent, namely, one PH Lau, established a company called 'E. Excel (Malaysia) Sdn Bhd', with the petitioner and Barry Le (R4) each holding 48% of the issued capital, and the fifth respondent, PH Lau, holding 4%.

[24] Under the arrangement between these three persons (petitioner, Barry Le and PH Lau) the petitioner need not have to pay for his shares in the respondent company.

[25] Under the arrangement between them, the petitioner's was to work for and develop the business of the company, in return for the 'free' shares. Pursuant to the arrangement, he was appointed the general manager and a director of the respondent company. He managed the company from an office in Sungai Buloh with eight to nine staff.

[26] Unfortunately, things did not turn out well: for the company performed badly and was running at a loss. As a result, the three shareholders-cum-directors decided to end the venture. They held a meeting of the Board of Directors on 28 October 1992 to determine the future of the company. At this meeting, the three directors-cum-shareholders (that is to say, the petitioner, Barry Le and PH Lau) formally decided to end the business venture. All of them voted to wind up the company. At this meeting, the petitioner offered to sell his shares to Barry Le and PH Lau. The offer, however, was not accepted. The next day, the petitioner formally offered to sell his shares in the company to Barry Le and PH Lau at a price of RM269,686. Again, there were no takers.

[27] The other directors, somehow, later, discovered that the petitioner had been withdrawing money from the account of the respondent company. As a result, an emergency shareholders' meeting was held on 19 January 1993 with the objective of removing the petitioner as a director of the company. The

petitioner attended this meeting *via* a proxy, namely, one Mr. Lawrence Teoh. The shareholders voted to remove the petitioner as a director. Mr. Teoh did not oppose the move to remove the petitioner, but he abstained from voting.

[28] After the removal of the petitioner from the respondent company, the day to day management of the company was handed to the second respondent, Hendrik, who was appointed acting general manager with effect from 1 November 1992. Hendrik was paid a modest monthly salary; but he was also paid a commission based on the sales of the company. In other words, his remuneration was linked to performance.

[29] Under Hendrik's management, the company prospered. The table below shows the performance of the respondent company during Hendrik's management.

Summary of Respondent Company's Financial Position from 1992-2004

Year	Turnover	Profit Before Tax	Profit After Tax	Accumulated Profits/Loss Brought Forward
1992	1,706,418	-354,211	-354,211	-354,211
1993	2,721,259	-35,364	-35,364	-390,175
1994	8,481,118	235,366	86,366	-303,809
1995	35,855,429	4,213,187	3,113,187	2,809,378
1996	68,193,003	4,020,259	2,470,259	5,279,637
1997	191,927,389	10,846,727	7,983,756	13,263,393
1998	210,488,036	-16,510,882	-16,444,882	-3,181,489
1999	174,393,038	-242,836	-242,836	-3,424,325
2000	190,491,180	6,637,913	6,637,913	3,213,588
2001	137,762,673	2,798,247	2,685,823	5,899,411
2002	123,874,984	10,443,797	8,111,500	14,010,911
2003	142,617,758	7,648,225	3,491,902	17,580,376
2004	193,718,027	17,837,573	13,386,526	30,966,902

[30] The petitioner, however, shortly after his removal as director of the respondent company, filed a petition under s. 181 of the Companies Act in the KL High Court (Suit No. D1-26-1-93). The purpose of this petition was to force a sale of his shares in the respondent company. This petition was, however, not pursued to trial by the petitioner following his non-compliance with an order of the court for security for costs. The petitioner gave the following reason for not pursuing the petition:

> the reason for not pursuing the said petition then was because I felt that my prospects of succeeding then were slim hence I was not ready to place security for costs required for that petition to be read.

[31] The first AGM of the company was held on 20 February 1993. A proxy of the petitioner attended this meeting. The AGM specifically noted (without any protest from the petitioner's proxy) that the accounts of the respondent company for the period ended 31 October 1992 could not be finalised because the source records of the company were missing since the petitioner's departure.

[32] Thereafter, nothing further was heard of the petitioner - until 1999. It is significant to note that although the petitioner visited Malaysia several times between 1993 and 1999, yet he did not get in touch with the company or its directors to inquire about the company. It is also important to note that he made no attempt to inform the company secretary of his new address, or to give instructions to the company secretary as to how future correspondence from the respondent company should be sent to him.

[33] Meanwhile, after 1993, changes in the shareholding of the respondent company took place. These are as shown in the table below:

Year	No. of Shares Allotted	Persons to Whom Shares were Allotted	Allotment Breakdown
1996	481,374	Hendrik Tjandra	190,000
		Zhang Sheng Mei	291,374
2000	2,500,000	Dr Chen Jau Fei	2,500,000
2005	1,500,000	Dr Chen Jau Fei	1,500,000

[34] It is to be noted that the principal changes were the equity participation of Hendrik and Dr. Chen Jau Fei.

[35] Subsequently, however, the petitioner resurfaced after having been disinterested in the affairs of the respondent company for seven years. By a letter of 4 September 1999, the petitioner wrote to advise the respondent company of his new address and also to ask for audited accounts of the company for the years 1991 to 1998. As requested, the company secretary duly delivered to him the audited accounts of the company. In accordance with his instructions, the change in his correspondence address was also duly updated by the company secretary.

[36] After his letter of 1999, the petitioner was not heard from again. Be that as it may, from 1999 onwards, he continued to receive the audited accounts of the company as well as the notices of shareholders' meetings.

[37] Now, it is important to note that, although the petitioner was in receipt of the audited accounts and notices of shareholders' meetings from 1999 onwards, he did not lodge any complaint with the respondent company regarding any of the matters stated in these accounts that he is not happy with; neither did he attend, either personally or by proxy, any of the shareholders' meetings from 1999 onwards – not until the AGM of 2004.

[38] Now, what happened was, in October of 2003, the second respondent, Hendrik, while holidaying in the USA, met the petitioner. At this social meeting, Hendrik asked the petitioner if he would consider selling his shares. The petitioner indicated that he would consider it.

[39] Subsequently, the 12th AGM of the respondent company was held. It was held on 30 April 2004. For the first time in over ten years, the petitioner attended a shareholders' meeting of the respondent company. There is a dispute as to what transpired at this meeting. Be that as it may, a few weeks after the meeting, the petitioner wrote to the respondent company seeking clarification on several matters that had been discussed at the meeting. These included:

(a) a clarification on the reason given for not declaring dividends;

(b) a clarification on payments made to a Taiwanese company called 'Extra Excel International (Taiwan) Inc';

(c) a clarification on the proposed increase in the paid up capital of the respondent company; and

(d) a clarification on the remuneration of the directors of the respondent company;

[40] The petitioner gave the Board of Directors of the respondent company 14 days to reply. He faxed his letter on 18 June 2004.

[41] The petitioner filed the instant petition on 1 July 2004.

The Court's Decision

[42] In my judgment this petition ought to be dismissed with costs for the following reasons.

The Conduct Of The Petitioner

[43] Firstly, the petition must be dismissed by reason of the conduct of the petitioner himself. He has not come to court with clean hands. I so hold for this reason. Unbeknown to the other directors of the company, the petitioner, since October 1992, had been withdrawing money from the respondent company's accounts. A total of nine withdrawals took place between 7 October and 31 October 1992. The petitioner signed nine cheques of the company to pay money to himself. All these were done without any authorisation from the Board of Directors of the respondent company. The petitioner's misconduct becomes all the more serious when one considers the fact that although on 28 October 1992 the Board of Directors had resolved to change the cheque signatories yet, notwithstanding this, the petitioner still carried on signing withdrawal cheques.

[44] It is the submission of learned counsel for the petitioner that in a s. 181 petition, the conduct of the petitioner is irrelevant, citing *Grace v. Bagioli and Others* [2006] 2 BCLC 70. On my part, however, I accept the submission of learned counsel for the respondents that based on *In re London School of Electronics Ltd* [1986] Ch 211 the conduct of a petitioner is relevant in deciding whether there has been unfairness and may even affect or deny the relief that is sought. In this case cited, it is held (at p. 222):

> The conduct of the petitioner may be material in a number of ways, of which the most obvious are these. First, it may render the conduct on the other side, even if it is prejudicial, not unfair; cf; In *re R A Nobel & Sons (Clothing) Ltd* [1983] BCLC 273.

> Secondly, even if the conduct on the other side is both prejudicial and unfair, the petitioner's conduct may nevertheless affect the relief which the court thinks fit to grant under subsection.

Acquiescence By Conduct On The Part Of The Petitioner

[45] Secondly, since the end of 1992 the petitioner had ceased to show any interest in the respondent company. His shareholding was a mere technicality. It is to be recalled that the petitioner never paid for his shares; and, as we have seen, at the end of 1992 he had voted to wind up the company and offered to sell his shares; and he had ceased to work for the company. Significantly, apart from the attendance of his proxy at two shareholders' meetings in early 1993, the petitioner was thereafter unheard from. He departed to the USA without notifying the company of his new address. The reasonable inference that should be drawn from these facts, as submitted by the respondents' counsel, is that the petitioner had lost interest in the respondent company did not want anything further to do with the same.

[46] In equity, a party may by his conduct disentitle himself from relief. This principle is known as the principle of acquiescence. This principle states that a person may by his conduct be deemed to have acquiesced to a state of affairs that is complained of, whereby the complaint would be regarded as having been made not in good faith, thereby disentitling relief. In *Re Senson Auto Supplies Sdn Bhd* [1987] 1 LNS 110; [1988] 1 MLJ 326, it was held (at p. 327 (MLJ)):

> Secondly, I noted that the major matters complained about by the petitioners appear to have been spread over a considerable period of time. It is settled law that delay by petitioners in initiating proceedings after they have realized that they have been victims of a scheme of oppression will induce the Court to refuse relief, since this indicates that they have acquiesced in the conduct complained about and their complaints are not therefore made in good faith (see *Re Jermyn Street Turkish Baths Ltd*).

[47] There is also the observation of Buckley J, *In re Jermyn Street Turkish Baths Ltd* [1971] 1 WLR 1042, on the importance of timely protest (at p. 1059):

> No effective protest was made about the allotment anytime before presentation of the petition, nor was any step taken to challenge its validity. This was not in any due to the acts or attitude of Mrs. Peskoff. It seems to us strange in these circumstances that

A the petitioner's should assert in May 1969 that what took place more than 15 years earlier was an act of oppression or a link in a chain of oppressive acts.

[48] In *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung* [1978] 1 LNS 170; [1978] 2 MLJ 227, the Privy Council made the following adverse remark about the petitioner's conduct (at p. 233 (MLJ)):

> As regards the respondent himself, though he was in a position by virtue of his position as Director from 1967 to 1971 to inform himself of the manner in which Beng Siew, as Managing Director, was conducting the company's affairs, he took no steps to do so. Though a shareholder since 1967 he took no steps to complain of the matters shown in the accounts until, after seeing the draft accounts for 1969, he complained of the amount of the donations.

[49] In the present case, it is important to note the following facts:

(a) The petitioner left in 1992 with a clear intention of bringing the relationship and business to an end. He left Malaysia without notifying the respondent company of his new address. Thus he did not want the company to contact him.

(b) He returned to Malaysia twice or thrice between 1993 and 1999, but did not bother to enquire about the affairs of the company; or to contact the directors of the company.

(c) He received the audited accounts and minutes of meetings of the respondent company for 1993 to 1998 sometime in 1999, after making a specific request, but sought no clarification on the matters it disclosed; nor did he lodge any protest or complaint.

(d) If indeed he had been serious or *bona fide* in the complaints that he now makes in his petition, from these accounts he would have been able to identify material or information in respect of many of the allegations that he now makes (such as fraud and related party transactions, non-payment of dividends, excessive directors' remunerations, excessive professional and legal charges, and excessive sums spent on computer system). In particular, he would have been able to observe from the accounts:

(i) that no dividends had been paid despite profits in some financial years;

(ii) that the directors were receiving remunerations and payments for expenses in the sums as shown in the accounts;

(iii) that every year money had been paid for 'legal and professional charges', in the sums as shown in the accounts;

(iv) that there were charges in respect of interest in the sums as shown in the accounts;

(v) that money in the sums as shown in the accounts had been spent on computer systems;

(vi) that the company had spent money on Systems Study and Consultation in the sums as shown in the accounts;

(vii) that the company was spending money in the sums as shown in the accounts on computer maintenance charges; and

(viii) that there have been changes in shareholding structure.

[50] As I have said earlier, the petitioner chose not to protest or to complain notwithstanding what the directors or the majority shareholders of the respondent company did - not until the year 2004, that is to say, after a very long delay and after having demonstrated a lack of interest in the affairs of the company.

Petitioner Failed To Prove Fraud

[51] Thirdly, there are the various allegations of fraud made by the petitioner against the respondents. I have read the petition and the petitioner's affidavits. Clearly, the petitioner, by his own affidavits, has failed to establish fraud beyond reasonable doubt. Learned counsel for the petitioner, however, attempted to establish fraud through lengthy cross-examinations of the respondents, hoping that through the lengthy cross-examinations he would be able to elicit some evidence that would go some way to substantiate the petitioner's allegations of fraud. With respect, learned counsel, in my judgment, did not succeed in his attempt. I accept the submission of learned counsel for the respondents that what we have from the petitioner is simply a collection of aspersions and suspicions.

[52] On the above grounds alone, the petition ought to be dismissed with costs.

The Cross-Petition

[53] In the present case, there is a cross-petition by the respondents - also based on s. 181 of the Companies Act. By this cross-petition, the respondents essentially seek the following prayers:

(a) that the petitioner's current shareholding in the respondent company be purchased by the respondents;

(b) that the court appoints an independent and qualified third party to value the petitioner's current shareholding in the respondent company; and

(c) that the purchase price of the petitioner's current shareholding in the respondent company be determined by the court.

[54] It is the contention of the respondents that in this petition the petitioner is the true oppressor; and not them. It is contended by the respondents that the petitioner's actions are prejudicial to the respondent company and also to the respondents as the shareholders of the company.

[55] The petitioner opposed the cross-petition, citing *Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & 5 Ors And Another Application* [1994] 1 LNS 73; [1994] 2 MLJ 789.

[56] In my judgment, by virtue of s. 181(1)(a) of the Companies Act, a petition (and this includes a cross-petition) under s. 181 of the Act can only be brought against a member (meaning a shareholder) who is in a position to conduct the affairs of the company. In other words, a petition under s. 181 can only be brought against a controlling shareholder of the respondent company. It is true that the petitioner is a member, a shareholder. But in the instant case, the petitioner, being only a minority shareholder, he is in no position to conduct the affairs of the company, let alone to conduct the affairs of the company in an oppressive manner against the majority shareholders, that is to say, against the respondents.

[57] Hence the cross-petition must be dismissed.

[Petition is dismissed with costs awarded to respondents (to be taxed); cross-petition is also dismissed. Any sum awarded to the respondents as taxed costs is to be reduced by 25% by reason of the dismissal of the cross-petition.]